

- (1) What is the nature and extent of claimant's disability, i.e., is claimant entitled to a work disability or a functional impairment?
- (2) If claimant is entitled to work disability, what is the nature and extent of claimant's work disability?

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

The Special Administrative Law Judge found claimant entitled to a forty-nine percent (49%) permanent partial general body work disability as a result of injuries suffered on July 1, 1991. The Appeals Board finds claimant is entitled to an eight percent (8%) functional impairment to the body as a whole for the injuries suffered on the above-specified date.

The claimant was working as a sandblaster for the respondent on the date of injury when he pulled on a sandblasting hose, causing him to twist and experience a sudden onset of pain in his upper back. Claimant collapsed to the ground and was taken by ambulance to St. John's Hospital in Joplin. Claimant was off work approximately three (3) days and then returned to work performing the same activities as those performed prior to the injury. Claimant worked until September 16, 1991, at which time he left work alleging to be in too much pain to continue. He sought medical treatment with Dr. Nelson, who referred him to Dr. Ball. He also sought medical treatment from Dr. Randall Hendricks and underwent an independent medical examination by Dr. Revis Lewis.

Subsequent to leaving respondent's employment, claimant received unemployment compensation for approximately one (1) year. Shortly after his unemployment benefits expired, claimant obtained work with Westfall Mobile Homes, setting up mobile homes. This job required that claimant crawl under the mobile homes and lift concrete blocks on a regular basis. Claimant testified that when he went to work for Westfall he did not tell them of his workers compensation claim nor did he tell them of any physical restrictions to his ability to perform work. Claimant knew when he hired on with Westfall that the job would require crawling under mobile homes. Claimant worked for Westfall for approximately one and one-half (1½) months, at which time he terminated his employment. One (1) week later he went to work for Riverton/Lowell Cablevision, installing cables. Riverton/Lowell paid claimant \$5.25 per hour, straight time, installing television cables.

Claimant testified that his job with respondent required that he lift two-hundred to two-hundred and fifty (200-250) pounds on a regular basis, meaning more than fifty percent (50%) of the time. When filling out information for work hardening, claimant described his job as requiring one-hundred to one-hundred and fifty (100-150) pound lifting on a regular basis. Mr. Ray Geis, the manufacturing manager for the respondent, testified claimant would at no time be required to lift over seventy-five (75) pounds because respondent had equipment available that would be used to lift anything heavier. The sandblasting hose used by claimant weighed approximately five to six (5-6) pounds empty. When full of sand and air pressure, it would weigh approximately twenty (20) pounds. Mr. Geis did admit claimant's job required some twisting and stooping. The equipment worn by claimant, including the oxygen helmet and other protection, would weigh approximately ten to fifteen (10-15) pounds.

Mr. Geis testified that when claimant terminated his employment in November 1991, it was due to a general layoff. The reduction in staff which caused claimant to lose his job involved twenty-eight (28) other employees. Claimant had avoided layoffs on October 11, 1991 and November 8, 1991, when other employees with less seniority than him were laid off. Mr. Geis testified that claimant was eligible for reapplication but claimant had not reapplied for work. Respondent received slips from the doctors in January 1993 returning claimant to work without restriction. This would have qualified him for rehire.

"In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends." K.S.A. 44-501(a).

K.S.A. 44-508(g) defines burden of proof as follows:

“Burden of proof’ means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party’s position on an issue is more probably true than not true on the basis of the whole record.”

Burden of proof is upon the claimant to establish his right to an award of compensation by proving all the various conditions on which his right to a recovery depends. This must be established by a preponderance of the credible evidence. Box v. Cessna Aircraft Co., 236 Kan. 237, 689 P.2d 871 (1984).

K.S.A. 1992 Supp. 44-510e(a) states in part:

“There shall be a presumption that the employee has no work disability if the employee engages in any work for wages comparable to the average gross weekly wage that the employee was earning at the time of the injury.”

Claimant returned to his employment at Wiseda and worked at a comparable wage for several months subsequent to the injury. After leaving his employment with Wiseda due to a general layoff, claimant was able to collect unemployment benefits for nearly one (1) year and shortly thereafter was able to earn, with two (2) different companies, wages comparable to those being earned with the respondent.

The Appeals Board finds that, based upon a review of the entire record, claimant has failed to show by a preponderance of the credible evidence that the presumption of no work disability contained in K.S.A. 1992 Supp. 44-510e(a) has been overcome. As such, claimant is limited to a functional impairment.

K.S.A. 1992 Supp. 44-510e(a) states in part:

“Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence.”

Dr. Revis Lewis opined claimant had suffered a ten to twelve percent (10-12%) functional impairment either caused or contributed to by his work-related injuries. Dr. Randall Hendricks opined claimant had suffered a five percent (5%) functional impairment to his low back as a result of the injuries alleged against respondent. In reviewing the medical evidence, the Appeals Board finds no legitimate reason for placing greater emphasis on the impairment rating of one doctor over the other. As such, the Appeals Board finds claimant would be entitled to a functional impairment of eight percent (8%) to the body as a whole based upon the medical records of Dr. Lewis and Dr. Hendricks.

### **AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award of Special Administrative Law Judge William F. Morrissey, dated May 9, 1994, shall be, and hereby is, modified as follows:

**AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR** of the claimant, Chris Huston, and against the respondent, Wiseda, Ltd., and its insurance carrier, Travelers Insurance Company, for an injury suffered on July 1, 1991, and based upon an average weekly wage of \$261.56, for 19 weeks temporary total disability compensation at the rate of \$174.38 per week, in the sum of \$3,313.22, followed by 396 weeks of permanent partial disability compensation at the rate of \$13.95 per week, in the sum of \$5,224.20, for an 8% permanent partial general body impairment of function, making a total award of \$8,837.42.

As of March 24, 1995, claimant would be entitled to 19 weeks temporary total disability compensation at the rate of \$174.38 per week, in the sum of \$3,313.22, followed thereafter by 175.57 weeks permanent partial general body functional disability at the rate of \$13.95 per week, totalling \$2,449.20, for a total of \$5,762.42, due and owing in one lump sum minus any amounts previously paid. The remaining balance of \$3,075.00 shall be paid at the rate of \$13.95 per week for 220.43 weeks or until further order of the Director.

Future medical shall be awarded upon proper application to and approval by the Director.

Unauthorized medical expense of up to \$350 is ordered paid to the claimant upon presentation of proof of said expense.

Claimant's attorney fee contract is hereby approved insofar as it is not inconsistent with K.S.A. 44-536.

Fees and expenses of the administration of the Kansas Workers Compensation Act are assessed against the respondent and insurance carrier to be paid as follows:

William F. Morrissey Special Administrative Law Judge	\$150.00
Delmont Reporting Services	
Transcript of Regular Hearing	\$70.90
Deposition of Chris Huston	\$289.75
Deposition of Karen Terrill	\$212.55
Deposition of Ray Geis	\$154.35
Deposition of Randall Hendricks, M.D.	\$286.50
Hostetler & Associates, Inc.	
Deposition of Revis Lewis, M.D.	\$129.95

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of March, 1995.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: David L. McLane, Pittsburg, KS  
Leigh C. Hudson, Fort Scott, KS  
William F. Morrissey, Special Administrative Law Judge  
George Gomez, Director